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REPORT ON NOTICE REQUIREMENTS IN PROCEEDINGS AGAINST MUNICIPAL BODIES

LRC 109

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To The Honourable Bud Smith, Q.C.
Attorney General Of The Province Of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON NOTICE REQUIREMENTS IN PROCEEDINGS AGAINST MUNICIPAL BODIES

The *Municipal Act* and the *Vancouver Charter* both provide that a claim for damages against a municipality or the City of Vancouver may be successfully asserted only if the claimant has delivered a written notice of the claim within two months from the date the damage was suffered. In many cases a failure to give notice of the claim does not prejudice the municipality and the only function of the requirement is to provide a "technicality" behind which the municipality and its insurer can hide to defeat otherwise worthy claims. As recommended by the Justice Reform Committee in *Access to Justice*, the functioning of the notice provisions was "referred to the Law Reform Commission of British Columbia for further study."

In this Report we recommend that the notice provisions be retained but in a significantly modified form. The kinds of claims for which notice would be required would, under our recommendations, be limited. The recommendations also provide for a more generous saving provision which would enable the courts to avoid injustice in individual cases. The recommendations are cast in the form of draft legislation.

A. Litigation and Notice Requirements Generally

When one citizen asserts a claim against another, the person against whom it is asserted usually learns of it first through informal means such as a letter. This will normally mark the beginning of a process aimed at disposing of the claim and resolving the rights of the parties. At some stage the claimant may commence a legal proceeding, either as a negotiating tactic, or to preserve rights against the possible lapse of a limitation period which would otherwise bar the claim.[1] At that stage the claimant becomes a plaintiff in the proceeding and the other person is the defendant.[2]

For a variety of reasons,[3] the defendant will wish to know of the claim as early as possible and it is usually in the best interests of the plaintiff to see this occurs. Occasionally, however, the service of the writ of summons is the event on which the defendant first becomes aware of the plaintiff's claim. The defendant may not be happy when that happens, particularly if the writ is served after a relatively lengthy period has elapsed since the occurrence of the facts alleged to give rise to the claim. Normally, however, there is little that can be done about it so long as the claim is not statute barred. There is no general requirement in the law that the plaintiff give to the defendant some sort of timely notice that a claim may be asserted.

B. Claims Against Municipal Bodies

A rare exception to the general rule stated above is to be found in the provincial legislation which governs proceedings against municipal governments. The person who wishes to assert a claim for damages against such a body must notify the potential defendant at an early stage. Section 755 of the *Municipal Act*[4] provides that a municipality is not liable for damages unless written notice setting out particulars of the incident on which the

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1. *See Limitation Act*, R.S.B.C. 1979, c. 236.
2. This terminology assumes that the proceeding is an action commenced by writ of summons. If it were an application commenced by petition the parties would be petitioner and respondent.
3. *See* Chapter III.
4. R.S.B.C. 1979, c. 290.

claim is based is delivered within 2 months from the date on which the damage was sustained. A parallel provision governs actions against the City of Vancouver.[5]

This provision has been on the statute book of the province for most of this century.[6] Whether its continued retention is justified has been questioned on a number of occasions in recent years and that question forms the subject matter of this Report.

C. Law Reform Activity in Relation to the Notice Requirement

The attention of the Law Reform Commission was first focused on notice requirements in 1974 in the context of a major project on the limitation of actions. The Commission's research identified four different provisions which set out a requirement for notice of proceedings against emanations of government. These included the provisions of the *Municipal Act* and the *Vancouver Charter* referred to above. The repeal of all four was recommended.[7]

The Commission's general recommendations on limitation of actions were accepted by government and a new *Limitations Act* was enacted in 1975.[8] The implementation of the recommendation concerning the notice provisions, however, was not straightforward. The Bill, at first reading, repealed all of the notice provisions identified by the Commission. At a later stage of the legislative process, however, the Bill was amended to retain the two notice requirements under consideration in this Report.[9]

In 1988, a major study of the province's justice system was carried out by the Justice Reform Committee under the chairmanship of the Deputy Attorney General, The Honourable E.N. Hughes, Q.C. The Committee received submissions on a wide variety of issues in relation to the administration of justice in British Columbia. These included submissions directed at section

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5. The *Vancouver Charter*, S.B.C. 1953, c. 55, s. 294(2). Anything said hereafter concerning s. 755 of the *Municipal Act* should be taken to both refer and apply with equal force to, s. 294(2). Both provisions are set out in full and discussed in Chapter II of this Report.

6. It first appeared as a provision of the *Municipal Clauses (Amendment) Act*, S.B.C. 1911, c. 37. The history of s. 755 was reviewed in *Donaldson Engineering Ltd.* v. *Nanaimo*, (1988) 20 B.C.L.R. (2d) 196 (S.C.).

7. Law Reform Commission of British Columbia, *Report on Limitations* (LRC 15, 1974) 116.

8. S.B.C. 1975, c. 37. *See now Limitation Act*, R.S.B.C. 1979, c. 236.

9. In 1977, the question of notice requirements came before the Commission in a slightly different context. In *Report on Tort Liability of Public Bodies* (LRC 34, 1977) 26, recommendations were made for a restatement of the law concerning the liability of highway authorities for non-repair. Imposing a notice requirement on parties wishing to assert a claim based on non-repair (as is done in some other jurisdictions) was considered and rejected.

755 of the *Municipal Act*. In *Access to Justice*, the final report of the Committee, it was observed:[10]

> The suggestion was made to the Committee that the 60-day notice provision in the Municipal Act should be repealed. This is the section that required a person to give notice to a municipality within 60 days of an injury or lose the right to bring a lawsuit against the municipality.

This was followed by a recommendation that the notice provision contained in the *Municipal Act* "be referred to the Law Reform Commission of British Columbia for further study."[11]

At about the same time, a submission was made on behalf of the Law Society of British Columbia to the Minister of Municipal Affairs calling for the repeal of the notice requirements.

In our formal response to the recommendation of the Justice Reform Committee, we described our prior work on this topic and observed:[12]

> The two notice provisions remain on the statute book and, as the Report of the JRC attests, continue to be a source of complaint.
>
> The conclusions set out in the 1974 *Report on Limitations* respecting these notice provisions retain their force as formal recommendations of the Commission. If it is the Attorney General's wish that they be re-examined, we would be pleased to do so.

In July 1989 the Attorney General accepted this invitation. He wrote to us with respect to a number of the "spinoffs" from the Report of the Justice Reform Committee including a request that we consider:

> Municipal Act - a re-examination of the recommendation in the Law Reform Commission's 1974 Report on Limitations that the requirement that 60-days notice be given to municipalities where a law suit for injury for loss is planned be repealed.

The recommendations in this Report are made consequent on that request.

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10. *Access to Justice: The Report of the Justice Reform Committee, 1988* at 226.
11. Recommendation No. 182.
12. Law Reform Commission of British Columbia, *Response to Access to Justice: The Report of the Justice Reform Committee, 1988* (LRC 101, 1988) reprinted in *Annual Report 1988/89* (LRC 104, 1989) 51, 61.

A. The Legislation

Section 755 of the *Municipal Act* and section 294(2) of the *Vancouver Charter* both require that written notice of action be given to the municipality or city within two months from the date on which the alleged damage was sustained. Section 755 of the *Municipal Act*[1] provides:

> **755.** The municipality is in no case liable for damages unless notice in writing, setting forth the time, place and manner in which the damage has been sustained, is delivered to the clerk within 2 months from the date on which the damage was sustained. In case of death of a person injured the failure to give notice required by this section is not a bar to the maintenance of the action. Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes there was reasonable excuse and that the defendant has not been prejudiced by it in its defence.

Section 294(2) of the *Vancouver Charter*[2] states:

> **294.**(2) The city is in no case liable for damages unless notice in writing, setting forth the time, place and manner in which such damage has been sustained, shall be left and filed with the City Clerk within two months from and after the date on which such damage was sustained; provided that in case of the death of a person injured the want of a notice required by this subsection is not a bar to the maintenance of the action. The want or insufficiency of a notice required by this subsection is not a bar to the maintenance of an action if the Court or Judge before whom such an action is tried or, in the case of an appeal, the Court of Appeal is of the opinion that there was reasonable excuse for the want or insufficiency and that the city has not been thereby prejudiced in its defence.

The majority of cases in British Columbia which have considered notice requirements focused on the provision of the *Municipal Act*[3] but, given that virtually identical language is employed in the two sections, this body of case law is obviously applicable to the *Vancouver Charter*. Since similarly framed provisions are also found in the statutes of other provinces, cases decided under them are also helpful construing the British Columbia legislation.

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1. *Municipal Act*, R.S.B.C. 1979, c. 290, s. 755.
2. *Vancouver Charter*, S.B.C. 1953, c. 55, s. 294(3), as am. S.B.C. 1987, c. 52, s. 21.
3. Of the 36 British Columbia decisions examined, only 2 arose under the *Vancouver Charter*.

B. Scope of the Legislation

1. Who Is Protected?

(a) Employees and Agents

It seems clear that the notice requirement exists with respect to claims against a municipality or the city. Those bodies, however can only act through their employees and agents. In many cases a claim may be asserted against a municipality only because it is vicariously liable for the wrongful act of one of its employees. A claimant will usually wish to sue the municipality because of its "deep pocket" but is not as a matter of law required to do so. Where a claimant proceeds against civic officials, agents or employees personally, the notice requirements do not apply.[4]

This creates something of a "hole" in the protection which local government bodies believe they enjoy with respect to notice. A municipality may be called upon to indemnify an employee (or contractor) who is held liable for a wrong committed in the course of work on behalf of the municipality. This indemnity might arise as a matter of contract with the employee, it might arise by operation of law,[5] or it might simply reflect a policy adopted by the municipality to ensure "labour peace" with its employees.

In this regard it is interesting to note that the *Municipal Act* expressly authorizes the enactment of bylaws providing for indemnity and limits the ability of a municipality to claim over against an employee. Section 262 provides:

> (2) The council may by bylaw provide that the municipality will indemnify an officer or employee of the municipality or a member of its council against a claim for damages against an officer, employee or member of the council arising out of the performance of his duties and, in addition, pay legal costs incurred in a court proceeding arising out of the claim.
>
> (3) The council shall not seek indemnity against an officer, employee or member of council in respect of any action of the officer, employee or member that results in a claim for damages against the municipality, but the council may seek indemnity against an officer, employee or member where the claim arises out of the gross negligence of the officer, employee or member, or where, in relation to the action that gave rise to the claim against an officer or employee, the officer or employee wilfully acted contrary to
>
> (a) the terms of his employment, or
>
> (b) an order of a superior.

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4. *Herdink* v. *Calgary*, (1961) 37 W.W.R. 74 (Alta. S.C., App. Div.).
5. *See, e.g., Canadian Imperial Bank of Commerce* v. *Richmond*, [1980] B.C.D. Civ. 2967-06 (S.C.).

A person who has a claim for damages against a municipality, and who has failed to deliver the required notice, may still bring proceedings against any individual employee of the municipality who may be at fault. Assuming there is liability, and the claim is one which the municipality would have satisfied directly had notice been delivered as required, it would be highly detrimental to good labour relations to require the employee to carry the full financial burden of satisfying the claim. Good sense demands that the municipality stand behind its employees and to this extent the protection of the notice requirement is rendered nugatory.

(b) Police

The position with respect to wrongs committed by municipal police officers calls for special comment. Like ordinary municipal employees, police officers can be sued personally and there is no requirement to give notice.[6] At common law, notice would have been futile in any event because a police officer was not regarded as an employee of the municipality so such wrongs did not give rise to vicarious liability. The municipality was immune from suit although it might still choose, or be required, to indemnify the officer for reasons described above.

In British Columbia, the common law position has been altered by the *Police Act*.[7] Municipalities are now jointly and severally liable with their police officers for the torts of the latter. Section 54(1) provides:

> **54.**(1) Subject to an agreement under section 19 (3) or 32, a municipality is jointly and severally liable for torts of municipal constables, special municipal constables, bylaw enforcement officers and employees of the board, employed by the board on behalf of the municipality, that are committed in the performance of their duties.

While the impact of the provision on the notice requirement does not appear to have been tested in the courts, Section 54(1) probably does no more than put claims based on wrongs by police officers on the same legal footing as those of other employees. The *Police Act* also contemplates indemnification of an officer who is sued personally:

> (2) Where it is alleged or established that a municipal constable, special municipal constable, bylaw enforcement officer or em-

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6. *Tenove* v. *Patterson*, (1978) 8 Alta L.R. (2d) 391 (App. Div.), *aff'g*. 3 Alta L. R. (2d) 318.
7. R.S.B.C. 1979, c. 331, s. 54.

ployee of a board has committed a tort in the performance of his duties, the board and members of the board are not liable for the claim, but the municipality in which he is employed by the board may, in the discretion of the council of the municipality, pay an amount it considers necessary to

(a) settle the claim or a judgment against him; and
(b) reimburse him for reasonable costs incurred by him in opposing the claim.

2. What Claims Require Notice?

The notice requirement provided in the *Municipal Act* and the *Vancouver Charter* applies to actions for "damages." This is an important limitation on its scope. No notice is required if the plaintiff's action is, in substance, for debt.[8] Similarly, a notice would seem to be unnecessary where the claim is for equitable relief such as an injunction or specific performance, or for contribution or indemnity.

A question which only recently seems to have received attention is whether the notice requirement extends to damage claims arising out of both tort and contract or whether it is restricted to the former. Cases now confirm that notice is required in both types of claim.[9]

C. Death of the Person Injured

The second sentence of section 755 of the *Municipal Act* provides:

> In case of death of a person injured the failure to give notice required by this section is not a bar to the maintenance of the action.

The circumstances in which this "death exception" was intended to provide relief from the consequences of a failure to give notice are less than clear and it raises a number of questions.

A quick reading suggests that it is intended to apply to proceedings for wrongful death.[10] Further reflection, however casts some doubt on this view. In such a proceeding the plaintiffs are the surviving dependents of the deceased person. They are the persons who have been "injured" by the wrongful conduct which

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8. *Craig's Construction (Pincher Creek) Ltd.* v. *Sparwood*, (1989) 37 B.C.L.R. (2d) 229 (C.A.), *aff'g.* (1987) 17 B.C.L.R. (2d) 34 (S.C.). *Quaere* the status of claims for contribution or indemnity with respect to a liability based on damages. *See Weinerth* v. *Allin*, [1989] B.C.D. Civ. 2976-05 (Co. Ct.).
9. *Donaldson Engineering & Construction Ltd.* v. *Nanaimo*, (1987) 20 B.C.L.R. (2d) 196 (S.C.); *Carston* v. *Cowichan Valley R. D.*, (1988) 28 B.C.L.R. (2d) 360.
10. Proceedings under the *Family Compensation Act*, R.S.B.C. 1979, c. 120.

caused the death. Are they the "injured" persons for the purpose of the exception?

This raises the question what is meant by "injured." Does the concept of injury embrace any claim which might result in an award of damages and for which notice must be given such as a claim for wrongful dismissal? Or is it narrower and confined to some sort of physical trauma suffered by a person? Is a person whose property has been physically damaged a "person injured" within the meaning of the exception?

It should also be noted that the exception does not seem to require any connection between the death and the facts (or injury?) on which the claim is based. The plaintiff may die of natural causes between the time the claim arose and litigation concerning it comes to fruition. The litigation may be continued by the estate. If no notice had been given, the death exception might well remove the bar which would otherwise exist. It is difficult to see why the estate should be in any better position than would have been the case had the original plaintiff survived.[11]

There is a paucity of case law construing the death exception and anything said about its effect is necessarily speculative.

D. Sufficiency of Notice

Section 755 of the *Municipal Act* does not stipulate any particular form which a notice must take. It does, however, describe some of the characteristics the notice must have. Since it requires that the notice be "in writing" a document of some kind is contemplated. Oral notice is not sufficient. It must be a document "setting forth the time, place and manner in which the damage has been sustained." The courts seem to have approached this requirement flexibly:[12]

> A notice under this section should not be construed with extreme strictness and as a general rule is sufficient if it reasonably discloses the ground of the complaint relied upon by the plaintiff.

It also appears that there must be some nexus between the plaintiff and the person who delivered a document claimed to be

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11. The improved position of the estate might, arguably, be justified if the death occurred before the 2 month period for giving notice had expired. But the statute does not limit the exception in that way.

12. *Sandhu* v. *Prince George*, (1981) 31 B.C.L.R. 1 at 3 *per* Legg J. (S.C.). *See also Iveson* v. *Winnipeg*, (1906) 5 W.L.R. 118, 126 (Man. C.A.); *Pearson* v. *Vancouver Board of School Trustees*, [1941] 3 W.W.R. 874; *Gard* v. *Duncan School Trustees*, [1945] 3 W.W.R. 485, [1946] 1 D.L.R. 352.

notice, and between the proceeding and the circumstances which prompted the delivery of the document. Moreover, the plaintiff must intend that the document constitute notice. In *Carston* v. *Cowichan Valley R. D.*[13] a municipality, sued by a former employee for wrongful dismissal, alleged that sufficient notice had not been given. The plaintiff's union had written to the Labour Relations Board complaining of the dismissal and a copy of that letter had been sent to the municipality. This, it was held, was not sufficient notice under the Act:[14]

> [This copy] could not possibly have been intended by the plaintiff to constitute a notice under s. 755. Not only was it not his [the plaintiff's] own document, but it was part of a procedure entirely different from an action for damages.

E. The Running of Time

The notice requirement stipulates that the relevant period is 2 months from "the date on which the damage was sustained." What is it that triggers the running of time to give notice? When can it be said that "damage was sustained?" This question was recently considered by the Court of Appeal in *Grewal* v. *District of Saanich*:[15]

> From what date does time run for giving notice under s. 755 of the *Municipal Act*?
>
> ...
>
> Saanich submits that the damage was sustained no later than August 1983, and the notice given February 7, 1984, was out of time.
>
> The first thing to be noticed about s. 755 is that it does not limit the time within which an action is to be brought. But the section has the same draconian effect as a limitation period because it bars recovery if notice has not been given, and if the saving provisions based upon reasonable excuse and no prejudice are not met.
>
> Secondly s. 755 is not confined to giving notice that damage has been sustained but also the notice must provide information of - "the time, place, and manner in which the damage is sustained."
>
> The object of the section ... is to provide an early opportunity for the municipality to examine the place where the damage has occurred, to interview witnesses, and to consider whether to settle or contest the matter.

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13. *Carston* v. *Cowichan*, (1988) B.C.L.R. (2d) 360.
14. *Ibid.*, at 363. The letter was also deficient in that it did not state the time and place at which the dismissal had occurred. *See also Sandhu* v. *Prince George*, *supra*, n. 12 in which a "public works department vehicle accident report" filed by a city employee after an incident did not constitute a notice on which the plaintiff could rely for the purposes of s. 755.
15. (1989) 38 B.C.L.R. (2d) 250.

> In order for the section to fulfil its apparent purpose a claimant must be in a position to know what and who has probably caused or contributed to the damage which has been sustained.
>
> The duty to give notice to the municipality of a possible claim does not arise merely from the discovery of the damage. The complainant must be able to give particulars of the time, place, and manner of the damages. Furthermore, the complainant must be in a position to know that the municipality has committed some act or has omitted to do something which may make it liable, in whole or in part, for the damage sustained by the complainant before the duty to give notice can arise.
>
> ...
>
> In this case the Grewals did not acquire knowledge which was sufficient to satisfy the requirements and to fulfil the purpose of s. 755 until mid December 1983, when they discovered that Saanich had known of serious soil problems before issuing a building permit, and had failed to warn the Grewals. In our opinion, the duty to give notice did not arise until that date and thus a notice given on February 7, 1984 was in compliance with the section.

The Court of Appeal has adopted a "discoverability" rule to define the time at which the notice requirement arises and the two month time period begins to run.[16]

F. The Saving Provision

1. General

The legislation contains a "saving provision" which permits a plaintiff, who has failed to give sufficient (or any) notice within the 2 month time limit, to demonstrate that there exists a "reasonable excuse" for the failure and that the municipality will not be prejudiced in its defence by the failure. If the court is satisfied that those conditions have been met the plaintiff may proceed with the action.

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16. A discoverability approach to the notice requirement was also taken by Legg. J. in *Gagner* v. *District of Mission*, (1987) 14 B.C.L.R. (2d) 328 (S.C.), with additional reasons at 19 B.C.L.R. (2d) 13 (S.C.). It also governs the running of time under the special limitation period in s. 754 which requires that a proceeding against a municipality for the unlawful doing of something which the municipality might have lawfully done had it acted in a manner prescribed by law be brought "within 6 months after the cause of action shall first have arisen." So far as the application of the special limitation period in s. 754 is concerned, the cause of action arises at the moment a plaintiff discovers the damage or, acting with reasonable diligence, should have discovered the damage. *See Kamloops* v. *Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, applying the English decision of *Sparham-Souter* v. *Town & Country Developments (Essex) Ltd.*, [1976] Q.B. 858 (C.A.); *Elkiw* v. *Harris*, [1987] B.C.D. Civ. 2976-01 (S.C.). *See also Ordog* v. *Mission*, (1980) 31 B.C.L.R. 371 (S.C.). Under the *Limitation Act*, R.S.B.C. 1979, c. 236, "non-discovery" by the plaintiff may also preserve his rights but a somewhat different conceptual approach is involved. Under the *Kamloops* rule the accrual of the cause of action itself is deferred (at least for limitation purposes) until discovery. Under s. 6 of the *Limitation Act* non-discovery postpones the beginning of the limitation period without affecting when the cause of action actually accrues.

It should be noted that the plaintiff is not entitled to relief unless both of these conditions are met:[17]

> A study of the section [s. 755] points out that the elements of "reasonable excuse" and "no prejudice in defence" are essential ingredients to be proven in order to escape the bar to a maintenance of an action. These two essential ingredients must exist together.

Thus even where the municipality is not prejudiced by the failure to give notice, the action will still be barred if the plaintiff cannot bring forward a reasonable excuse.[18]

2. Reasonable Excuse

What constitutes a "reasonable excuse" is not defined in statute or in the case law specifically. This appears to be a determination made on a case-by-case basis depending on the circumstances. Some cases suggest that the result is more of an intuitive response by the court rather than the application of steadfast principles. Still, it is possible to make some generalizations, and discern trends, in the way courts approach the notion of "reasonable excuse."

Until a few years ago, at least where the municipality was not prejudiced, the courts were inclined to adopt a generous attitude. They strove to find something in the circumstances of the case which would constitute reasonable excuse.[19] A much stricter approach seems to have emerged in more recent cases. This is vividly illustrated by two British Columbia decisions which consider whether the plaintiff's minority constitutes a reasonable excuse for a failure to give notice.

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17. *Schmidt* v. *Prince Rupert (City)*, (1960) 31 W.W.R. 278, 279 (B.C.C.A.). *See also Schuman* v. *Vancouver*, (1934) 48 B.C.R. 191 (S.C.).

18. This position might be contrasted with that which prevails under comparable Ontario legislation. There, if the municipality is not prejudiced the plaintiff can pursue his action whether or not there was a reasonable excuse for his failure to give notice:

> **284.** (6) In the case of the death of the person injured, failure to give notice is not a bar to the action and, except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice is not a bar to the action, if the court or judge before whom the action is tried is of the opinion that the corporation in its defence was not prejudiced by the want or insufficiency of the notice and that to bar the action would be an injustice, notwithstanding that reasonable excuse for the want or insufficiency of the notice is not established.

Municipal Act, R.S.O. 1980, c. 302, s. 284(6).

19. *Howard* v. *South Vancouver*, (1924) 34 B.C.R. 167 (S.C.); *Weir* v. *Turnberry*, [1931] O.R. 309, [1931] 3 D.L.R. 255, *aff'd.* [1932] O.R. 692. There are also cases in which the municipality appeared to give the plaintiff some type of assurance that a notice was sufficient when in fact it was not. This may constitute "reasonable excuse" where there is no prejudice to the municipality. *See Archer* v. *Powell River*, [1982] B.C.D. Civ. 2976-01 (S.C.); *Hugh* v. *Vancouver*, [1981] 5 W.W.R. 250 (B.C.S.C.).

In *Griffiths* v. *Prince George*,[20] decided in 1972, Gould J. approached the question this way:[21]

> I am of the opinion the general trend of the law is accurately set out in Roger's *Law of Municipal Corporations*, 2nd ... namely, that a generous attitude should be taken by the Court in deciding what would be a reasonable excuse.
>
> For the purposes of this case I am impressed by the judgment of Raney, J., in *Fergus v. Toronto*, [1932 2 D.L.R. 807 ... and particularly the passage which reads as follows:
>
> As to want of notice, the father's ignorance of the law was no excuse...
>
> But the boy's claim is on a different footing. It is said to be a case of first instance in this Court on the point of failure of an infant to give the statutory notice, but even the common law will not assume that a child of 10 knows the statute law.
>
> I am going to follow the reasoning of that case.

The second case, *Steiger* v. *Slough*,[22] was decided in 1987. It has been summarized as follows:

> With respect to the infant plaintiff's mother, ignorance of the law is no excuse.... Similarly there can be no distinction with respect to an infant child of tender years who one cannot assume to be familiar with the statutory requirements. Had the legislature intended that the section should not be applicable to infants such an exception would have been so expressed in the statute.

This case is consistent with recent Court of Appeal authority that has prescribed very severe conditions which must be met before "reasonable excuse" can be said to exist.

In *Horie* v. *Nelson*[23] the plaintiff suffered a severe electrical shock as a result of contact with municipally owned power lines. A lawyer was consulted as to a possible claim against the municipality and as a result a notice was prepared. It was signed by the plaintiff in the hospital but it was never delivered to the municipality.[24] The question confronting the court was described as follows:[25]

> [C]ounsel submits that we should hold that [the plaintiff] did what a reasonable person would do, that is, consult a lawyer, sign the notice and entrust it to his wife and the lawyer. So the taking of these steps would constitute reasonable excuse.

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20. (1972) 34 D.L.R. (3d) 125 (B.C.S.C.).
21. *Ibid.*, at 126.
22. [1988] B.C.D. Civ. 2976-02.
23. (1988) 20 B.C.L.R. (2d) 1 (C.A.), leave to appeal refused 27 B.C.L.R. (2d) xxxv (S.C.C.).
24. The evidence was equivocal as to where, as between the plaintiff and the lawyer, the fault lay for the non-delivery. For the purposes of an inquiry into "reasonable excuse" the court was prepared to assume it was the fault of the lawyer.
25. *Ibid.*, at 6.

The answer was a test extracted from older Ontario authority and framed as follows:[26]

> It is exceedingly difficult to lay down any general rule, as the circumstances in each particular case must in the last analysis be the guide to the decision, but I venture to suggest that if there is any principle to be extracted from the decisions, it is that to constitute reasonable excuse there must be such incapacity, either mental or physical, on the part of the injured party, as to incapacitate him from discussing business affairs or from being able to give instructions for the notice.

It was held that the test had not been met and the action against the municipality was dismissed.

The result is even more draconian having regard to the total lack of prejudice to the municipality:[27]

> It is clear, and not contested, that absence of prejudice to the city has been shown. The purpose of the legislation has been achieved. The city had the opportunity of not only examining the accident scene but also interviewing witnesses in a timely way and of considering whether to settle or contest the claim.
>
> ...
>
> Counsel for the appellants argued that if a party knows that the city is aware of the incident and anticipated claim it is an element favouring a finding of reasonable excuse. I do not agree. In *Schmidt* v. *Prince Rupert* [it was] said:
>
> > There may be good grounds why lack of prejudice to the city may rationally be good grounds for excusing omission to give the two-months' notice in writing, but if so, it is for the legislature to so amend sec [755]. The court itself cannot rewrite the statute.

One cannot help but sense, in the final passage, a muted call for legislative reform.

The result of *Horie* v. *Nelson* suggests that a plaintiff will be able to establish reasonable excuse only in the most extreme and unusual cases. The ability of the courts to relieve from the consequences of non-compliance has been severely limited.

3. Prejudice

Along with the burden of showing a reasonable excuse, the plaintiff must also satisfy the court that the municipality will not be prejudiced in its defence by want or insufficiency of notice. Prejudice may be caused either by the failure to give notice with-

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26. From *Trussler* v. *Kitchener*, [1936] O.R. 53, 56 (C.A.), quoting *Bissell* v. *Rochester*, (1930) 65 O.L.R. 310, 315.
27. *Ibid.*, at 6.

in the stipulated time or by giving a notice containing false or inadequate information. The question is:[28]

> Has the municipality, by the absence or insufficiency of the notice, been misled, hindered, delayed, or prevented in or from making a reasonably careful and thorough examination and making the same preparation for trial as it would have been able to had proper notice been given?

Actual knowledge by the municipality of the incident and of the damages suffered is usually sufficient to show that it has not been prejudiced.

28. Rogers, *Municipal Corporations* (2nd ed., 1971) 1346.

A. The Purpose of the Notice Requirement

The most often cited purpose or function which underlies the notice requirement is that stated by the Court of Appeal in *Grewal* v. *District of Saanich*:[1]

> The object of the section ... is to provide an early opportunity for the municipality to examine the place where the damage has occurred, to interview witnesses, and to consider whether to settle or contest the matter.

An "early opportunity" such as that described is one which virtually every defendant and potential defendant would regard as desirable. On what basis can local government bodies be singled out for particularly favoured treatment under the law which is denied to other litigants?

The Law Reform Commission's answer in 1974 was that no principled basis could be identified and this led to a conclusion that the notice provisions of the *Municipal Act* and the *Vancouver Charter* should be repealed. The request from the Attorney General requires that both the question and the Commission's answer be re-examined.

Our first step was to establish contact with the various municipalities. We did this by writing to the Union of British Columbia Municipalities, the Municipal Officers' Association, and the City of Vancouver. Copies of the letters from the Commission to these recipients are set out in Appendix A to this Report.

B. The Arguments for Retention

Responses to the Commission's letter were received from the City of Vancouver and the UBCM.[2] These responses are set out in full as Appendices B and C, respectively, to this report. Those responses described at some length reasons which were thought to justify the notice requirement itself and the special position they enjoy with respect to it. Between the two responses, they seem to capture most of what has been said or written in de-

1. (1989) 38 B.C.L.R. (2d) 250, 256.
2. The Municipal Officers' Association did not respond.

fence of the retention of notice requirements. Readers are urged to peruse them in full.

At the risk of introducing some distortion, we believe the points made in the responses, and by other commentators who have approached this issue from the perspective of the local government body, can be summarized as follows:

1. Notice permits the municipality to ascertain the facts surrounding an incident alleged to give rise to liability. It can interview witnesses and so on before the passage of time obscures memory of events and physical evidence.

2. Early notification of a dangerous situation is essential so that further occurrences which might lead to injury or damage may be prevented.

3. Special treatment for municipalities is warranted because they provide a public benefit of some kind. Altering the legal position to their detriment would result in an increased expense to all taxpayers within a municipality.

4. Municipalities are particularly vulnerable to claims. They are less able than other potential defendants to limit or manage their risk. The extent and nature of municipal activity, and their physical size, means that these public bodies cannot adequately supervise every location or activity which might give rise to an occurrence with liability consequences. Moreover, private defendants are often in a position to limit their exposure to risk by excluding members of the public from property under their control. A municipality cannot do this and, often, the provision of facilities to the public (such as recreational facilities) with attendant risk is often an integral part of its operation. It is suggested that many claims against municipalities result from the provision of a "service" unique to municipalities.

C. Our Analysis

1. Notice Generally

In our view the first three points in the summary set out above are the least persuasive. The first merely repeats the benefit which any defendant derives from early notification of a

claim. It does not provide a reason for conferring this advantage on municipalities but not extending it to other defendants.

It might be also be observed at this point that the circumstances in which section 755 requires that notice be given greatly overreaches the circumstances in which that notice will be of value. To say that notification enables the municipality to interview witnesses and gather evidence presupposes that witnesses would go uninterviewed and evidence ungathered in the absence of notice. But in a wide variety of circumstances appropriate investigations will be carried out whether or not any notice is ever delivered. Some incidents, by their very nature, suggest that a claim is possible or likely. Common sense alone dictates that the municipality should take early steps to investigate the incident with an eye on litigation. No notice is required as a "trigger."

In *Sandhu* v. *Prince George*[3] the plaintiff (an infant) was knocked off his bicycle by a vehicle owned by the defendant municipality and driven by its employee. An accident report was prepared by a city official and filed with the city manager's office. A notice under section 755, however, was never delivered to the defendant municipality and the action against it was dismissed for that reason. In a case like this, it cannot be seriously maintained that the municipality is deprived of an opportunity to interview witnesses and gather evidence. The plaintiff's failure to give notice is reduced to a pure technicality which results in a windfall to municipality (or probably more accurately, the municipality's automobile insurer). If the municipality has failed to investigate and is prejudiced in its defence, the fault lies with the municipality and its employees and it is not the injured party who should be made to suffer.

Section 755 also requires that notice be given with respect to claims for damages for breach of contract. In this context, interviewing witnesses and gathering evidence is less time-critical. The evidence is usually documentary and has a somewhat longer "shelf life" than two months. The notice requirement has little justification in relation to such claims.

In summary, if a notice requirement can be justified at all, it must be confined to a much narrower range of claims than are within the current legislation. These are claims which arise

3. (1981) 31 B.C.L.R. 1 (S.C.).

from incidents or circumstances of a kind that may be outside the knowledge of the municipality or its employees.

2. Prevention Of Further Injuries

The second argument put forward to justify the notice requirement relates to the prevention of injury to persons other than the claimant through, the correction of hazardous conditions which might otherwise go unnoticed. We have no quarrel with the proposition that the elimination of hazards and the prevention of injuries is a worthwhile goal. We do question whether the notice requirement is an efficient or fair way of achieving this goal.

So far as it acts as a kind of limitation period, the two month notice requirement seems unduly short. However, as an "alarm bell" which is meant to warn a municipality to correct a dangerous situation, it is far too long. The prevention of injury to others may call for action within days or hours. By the time two months has elapsed many more injuries may have occurred.

But to shorten the notice period to enhance its efficiency in this regard is no answer. The only result would be to heighten the perception of unfairness which currently surrounds its operation, without achieving a corresponding increase in the early reporting of hazards by injured parties. This, we believe, illustrates the difficulty of relying on the notice requirement to identify hazardous situations to see that they are brought to the attention of the proper authorities. The duty to do this should be broadly based and fall on the members of the public generally. Provided the municipality does nothing to make reporting difficult or onerous, a sense of civic responsibility should be sufficient to ensure that the duty is observed. If some reinforcement is thought necessary, it should be positive rather than negative.

Section 755, so far as it is concerned with the detection and correction of hazards, operates in a totally contrary manner. The duty of reporting is placed on one person, the victim of the hazard. The duty is enforced through a punishment rather than a reward. Moreover, the punishment, the victim's loss of a potential claim for damages of perhaps thousands of dollars, seems wholly disproportionate to the breach of civic responsibility involved.

3. The Public Purse

A similar analysis can also be applied to the argument that strict notice requirements are somehow justified because they may lead to a reduction in the level of public funds required (either directly or, through insurance, indirectly) to satisfy damage claims. This raises once again the essential fairness of visiting on a single member of society a burden which ought to be widely shared. If an act or omission of some person or body has resulted in an injury or loss to some other person why should the victim be placed in a worse position simply because the wrongdoer is "public" in character and its losses will ultimately be felt by the broad base of taxpayers? Some might even argue that where such a loss distribution mechanism is available, liability should arise in cases where no action would lie against a "private" defendant.

We are not persuaded by arguments founded on the protection of the public purse as a valid basis for a notice requirement.

4. The Special Character Of Municipal Activity

The final argument raised to justify the notice requirements arises out of the special character and scope of municipal activity. It comes the closest to identifying a legitimate distinction, between municipalities and most other potential defendants, which might justify a notice requirement. We say "most" because there is at least one body which also possesses the special character and functions ascribed to municipalities but which operates without the benefit of a notice requirement.

The submission made to us by the UBCM described the special character of municipalities in the following terms:[4]

> There can be little doubt that a municipality differs from most other persons and institutions. In addition to its authority to provide and maintain a myriad of services, it has statutory duties to protect the health and welfare of its inhabitants. It must assume many duties, regardless of risk, unlike many persons and institutions who can measure the risk and make their own determination as to whether the adventure will be undertaken.
>
> A municipality cannot ignore problems arising in health, waste management and the provision of roads. It cannot only undertake those things that are profitable or from which it may anticipate a profit. It must often expand its efforts in dealing with problems created by others.

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4. *See* Appendix B.

These observations are equally true of the Crown in the right of the Province of British Columbia. The Crown, however, is not protected by a notice provision comparable to section 755 of the *Municipal Act* and we have never heard it seriously suggested that it should be. It seems anomalous that municipal bodies should occupy a more favourable legal position than the Crown.

D. A New Notice Requirement?

1. Theory And Pragmatism

Fifteen years ago this Commission considered the notice requirements of the *Municipal Act* and the *Vancouver Charter* and concluded they should be repealed. Upon reconsidering these provisions we are unable to say that the earlier conclusion was wrong. Our reasons are essentially those set out in the previous section. The recommendations made in the 1974 *Report on Limitations*[5] retain their force as the formal views of the Commission, so far as the notice provisions in their current form are concerned.

This conclusion does not, however, rule out the development of a new provision which serves a notification function but operates in a more acceptable manner. Should that be done? The arguments which call for the repeal of the existing provisions also suggest that it would be inappropriate to replace them. There remain very strong arguments, based on notions of equal treatment, for repeal without replacement.[6]

The UBCM submission dismisses these arguments as a "theoretical concept" and suggests the need for a notice requirement is grounded in pragmatism:[7]

> [The Commission's 1974 recommendation] is based on the theoretical concept that municipalities should not have "preferred treatment" over other persons or institutions... It would be difficult for a municipality to sympathize with the theoretical concept when a claim is received in August based on negligence in removing ice and snow from a sidewalk in January.

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5. LRC 15.
6. An aspect of equal treatment not addressed in this Report is whether the special position of municipalities in any way violates the *Charter of Rights and Freedoms*. It might be argued that the notice requirement unjustifiably limits the rights set out in s. 15(1) that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination..." In *Teller* v. *Sunshine Coast Regional District*, (1988) 27 B.C.L.R. (2d) 73 (B.C.S.C.) it was held that s. 15(1) is not violated by the notice requirement. We understand that this case is currently under appeal.
7. The notice requirement also seems to have a certain symbolic value.

To a degree this is sterile wordplay. What one individual may regard as a "theoretical concept" may be a "matter of principle" to another, while a third may dismiss it as "dogma."

The issue, as we see it, is whether the concerns of pragmatism can be met without fatally compromising the legal and social values which transcend those particular concerns. We believe that it is worth exploring this issue to see if a bridge between pragmatism and theory can be identified. Such a bridge, if it exists, would be a new notice requirement which

(a) meets, so far as is possible, the legitimate concerns of municipal bodies,

(b) operates only in those situations where it serves a truly useful function, and

(c) minimizes the potential for injustice to those required to give notice.

The balance of this Chapter is devoted to describing, in general terms, the contents of a new notice requirement which might fit that description. Our conclusion and recommendations are set out in the next Chapter.

2. The Proper Scope Of A Notice Provision

It seems to be widely agreed that the scope of the current notice provisions is much broader than is necessary for the protection of municipalities. The focal point of this agreement is the application of the notice provision to claims for damages for breach of contract. The submission of the UBCM states:[8]

> It is agreed that there is not the same justification for notice requirements where the damages arise out of contract. It is submitted that in this regard the municipality should be treated the same as other institutions.

Clearly, a revised notice provision need not apply to claims based on breach of contract.

This leaves claims for damages based on tort. Should a new notice provision encompass all tort claims? This seems unnecessarily broad. As pointed out earlier there are many kinds of events which, by their nature, have the potential to result in a claim against a municipality and which are known immediately to one or more of its employees. An obvious example of this is a

8. *See* Appendix B.

motor vehicle accident or an intentional tort. The municipality has an interest in investigating the event with a view to determining its legal position, but that investigation should be triggered by some kind of internal reporting mechanism. Little is achieved by putting an onus on the claimant to activate the investigation process, other than to provide the municipality with a technical defence if the claimant slips up. A mandatory notice requirement is justified only in those situations in which the municipality is unlikely to learn of an occurrence unless it receives notice.

Can these situations be identified in any compendious way? A close reading of the submissions received from the UBCM and the City of Vancouver suggests that the kinds of situations in which the absence of a notice would be felt most keenly are those which have an "occupiers liability" flavour about them (including claims based on highway maintenance) and those based on nuisance. This is made clear by the following excerpts from the submission of the City of Vancouver:[9]

> [T]he City of Vancouver has approximately 1400 kilometers of roads, 700 kilometers of lanes, 2700 kilometers of sidewalks, 2000 miles of sewers, 900 miles of watermains, 97000 water service pipes, 6000 fire hydrants, 15 public swimming pools, 8 public ice rinks, 23 community centres and 162 parks on 3000 acres.
>
> Anytime one of our workers does anything negligent in respect of maintenance or repair to the foregoing infrastructure, we are liable.
>
> Our streets, lanes, sidewalks and parks are open to the public 24 hours a day, 7 days week. Over the years anything that can happen does happen.
>
> I am sure large corporations ... have many accidents on their various properties. However, I am equally sure that their risk management people are made aware of such accidents because their properties are closed to the public and, therefore, every accident of consequence is likely to be immediately known and reported. With City property, roads, lanes, sidewalks, etc., it is extremely unlikely that our risk management people would, in the absence of notice, be aware of more than 2 or 3% of the accidents which occur.

A revised notice requirement might be confined to claims based on occupiers liability, liability arising out of the construction or maintenance of highways and nuisance.[10] This would cover the situations of greatest concern to the municipal bodies. Moreover, in focussing on claims which arise from incidents or circumstances of a kind that are most likely to be outside the knowledge

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9. *See* Appendix C.
10. Brief notes on the law in relation to occupiers liability and to nuisance, with special reference to the position of municipalities and highway authorities, are set out as Appendices D and E to this Report.

of the municipality or its employees, it conforms to what seems to be the proper role of a provision which places a notification burden on claimants.

3. The Saving Provision

Like the existing notice requirement, a revised version should have some sort of saving provision to avoid injustice in individual cases where the claimant has failed to deliver notice. The saving provision of section 755 is defective in a number of ways. The claimant must satisfy the court that both the "no prejudice" and the "reasonable excuse" tests have been met. The latter is a very difficult test to meet and as a result claims will be barred even where the municipality has not been prejudiced.

In a revised notice requirement, the two tests should operate independently and each should provide a basis for relief. This view is consistent with that put forward by the UBCM:

> ... basic areas of complaint against Section 755 ... are as follows:
>
> ...
>
> (2) "reasonable excuse" has been restricted severely by the Courts;
> (3) the burden or proving prejudice should be on the municipality.
>
> ...
>
> With regard to "reasonable excuse," there is a substantial body of case law which has severely restricted exemption from the notice provisions. It is clear that ignorance of the law, negligence, infancy or physical disability does not provide reasonable excuse. Even the most serious physical injuries, which might incapacitate the claimant, do not provide an excuse for failure to give notice.
>
> It is submitted that the intent of this Section was to allow the Court to prevent undue hardship in individual cases and to allow the Court to look at all the circumstances in granting relief....[A] simple amendment would permit the Courts to allow exemption where there was no prejudice to the municipality and undue hardship to the claimant....
>
> All arguments against prejudice could be eliminated by placing the burden of proof on the municipality.

One aspect of the current saving provision which need not be carried forward is the exception which arises on "the death of a person injured." As indicated in Chapter II its application is obscure and it seems seldom to be invoked in practice.

A. Recommendation

In the previous Chapter we described, in general terms, what a revised notice requirement, which attempts to strike a balance between principle and pragmatism, might contain. It remains for us to consider whether such a model still represents such a significant departure from principles of equal treatment that it should be rejected on that basis.

While we remain unconvinced that a notice requirement of this kind can be truly justified for any litigant, we concede that a notice requirement structured along the lines described meets the bulk of our objections. Those which remain should not, we believe, lead us to take an entrenched position on this question. It is obvious that the municipalities derive a good deal of comfort from the existence of a notice provision and our remaining concerns do not provide an adequate basis for depriving them of one.

In this Chapter we set out a draft provision designed to replace section 755 of the *Municipal Act*. This draft is also intended to serve as a guide to the preparation of corresponding amendments to the *Vancouver Charter*. The draft is fully annotated and generally follows the principles outlined in the previous Chapter.

B. A Draft Provision

Section 755 of the *Municipal Act* is repealed and the following is substituted:

755.(1) A municipality is not liable on a claim described in subsection (2) unless written notice is delivered to the municipality within 2 months of

(a) if the claim is governed by the *Limitation Act*, the date on which, under that act, time began to run against the person asserting the claim, or

(b) if the claim is governed by section 754, the date on which the person asserting the claim knew, or in all the circumstances of the case ought to have known, the facts on which the claim is based.

Subsection (1) sets out the core requirement to give notice.

The claims to which it applies are those described in subsection (2).

A notice period of 2 months has been retained.

Paragraphs (a) and (b) stipulate when the 2 month period begins to run. They restate what appears to be the current law with respect to the running of time under s. 755.

(2) Subsection (1) applies to a claim for damages

(a) based on rules of law in relation to the use and occupation of land,

(b) based on a breach of a duty of care imposed by the *Occupiers Liability Act*,

(c) arising out of the construction or maintenance of a highway or footpath, or

(d) based on the law of nuisance.

Subsection (2) describes the kinds of claim which would be subject to the notice requirement.

Paragraphs (a), (b) and (c) will overlap somewhat, but taken together they cover the claims referred to in the previous Chapter as having an "occupiers' liability flavour."

Set out as Appendix D to this Report is a short note on the law in relation to occupiers' liability and the legal position of highway authorities. The full text of the *Occupiers Liability Act*, referred to in paragraph (b), is set out as Appendix F.

A short note on the law of nuisance is provided as Appendix E.

Even if a claim is one described in paragraph (a) to (d), if the liability of the municipality is based on vicarious liability, it falls outside the scope of subsection (2) and no notice is required with respect to the claim.

(3) A notice delivered under subsection (1) shall set out the facts on which the claim is based, including particulars of the time and place of any specific incident alleged to give rise to liability.

Subsection (3) carries forward the current requirements of s. 755 respecting the contents of a notice of claim.

(4) Notwithstanding subsection (1) and subsection (2), failure to deliver a notice shall not affect a claim if

Subsection (4) is the "saving provision" which permits the court to order relief from the consequences of failing to deliver notice as required by subsection (1).

(a) the municipality was not prejudiced by the failure and, for the purposes of this subsection

Lack of prejudice to the municipality is now a separate ground of relief. An evidentiary burden is placed on the municipality with respect to prejudice through a rebuttable presumption that no prejudice has occurred.

(i) it shall be presumed, in the absence of evidence to the contrary, that the municipality was not prejudiced by the failure, and

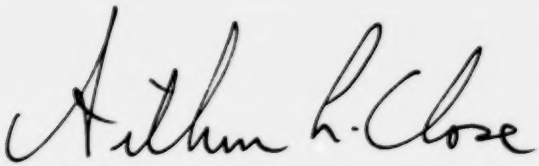
(ii) the municipality is not prejudiced by the failure if the municipality, or any of its employees or agents, knew, or ought reasonably to have known, of a specific incident alleged to give rise to liability, or

For greater certainty, paragraph (a)(ii) stipulates that a municipality is not prejudiced if it has the requisite degree of knowledge of an incident.

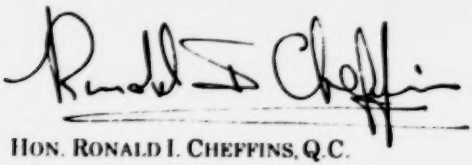
(b) in all the circumstances, having regard to the capacity and knowledge of the claimant, and to the claimant's conduct in relation to the claim, it is fair and reasonable that the claimant be excused from the consequences of the failure and that the claimant be permitted to pursue the claim.

The "reasonable excuse" criteria of s. 755 has been broadened and the question under paragraph (b) is whether it is "reasonable that the claimant be excused" having regard to the circumstances.

We believe that the recommended notice provision set out in the previous Chapter will achieve an appropriate balance between the needs of municipal bodies and the fair treatment of those who may wish to assert legitimate claims against them. We were encouraged to search for such a balance by the largely measured and sensible approach taken by the Union of B.C. Municipalities in its representations to the Commission.



ARTHUR L. CLOSE, Q.C.



HON. RONALD I. CHEFFINS, Q.C.

MARY V. NEWBURY

LYMAN R. ROBINSON, Q.C.

PETER T. BURNS, Q.C.

APPENDIX A

LETTERS INVITING SUBMISSIONS

LAW REFORM COMMISSION OF BRITISH COLUMBIA

July 19, 1989

Mr. Richard Taylor
Executive Director
Union of British Columbia Municipalities
Ste. 1, 10551 Shellbridge Way
Richmond, B.C.
V6X 3H1

Dear Mr. Taylor:

As you may be aware, last year a major study of our justice system was carried out by the Justice Reform Committee under the chairmanship of the Deputy Attorney General, The Honourable E.N. Hughes, Q.C. The Committee received submissions on a wide variety of issues in relation to the administration of justice in British Columbia. These included submissions directed at section 755 of the Municipal Act. In "Access to Justice," the final report of the Committee, it was observed:

> The suggestion was made to the Committee that the 60-day notice provision in the Municipal Act should be repealed. This is the section that required a person to give notice to a municipality within 60 days of an injury or lose the right to bring a lawsuit against the municipality.

This was followed by a recommendation that the notice provision contained in the Municipal Act be referred to the Law Reform Commission of British Columbia for further study. In mid-May, as part of the Attorney General's response to the various recommendations contained in "Access to Justice" the Attorney General formally referred to us an examination of the desirability of retaining the notice requirement.

This will not be the first time that the Law Reform Commission has addressed this issue. In 1974 it submitted a major Report on the Limitation of Actions generally, which included a consideration of this topic, and recommended the repeal of the notice provision contained in the Municipal Act. The following year virtually all the Commission's recommendations were adopted and enacted as what is now the Limitation Act. The Commission's recommendation for the repeal of the notice provision also appears to have been accepted, initially, by the government in 1975. The first reading version of the Limitation Act would have repealed the notice requirement. At some stage of the legislative process, the repeal provision was lost and the notice provision remains on the statute book. As the report of the Justice Reform Committee attests, it continues to be a source of complaint.

Unless and until it is rescinded or replaced, the conclusion set out in the 1974 Report respecting the notice provision retains its force as a formal recommendation of the Law Reform Commission. The Attorney General's recent reference requires that we re-examine the earlier recommendation and report on it either adhering to the previous view that the notice provision should be repealed or putting forward some alternative view.

The existence of a notice provision such as this is usually justified in the context of potential tort claims. It is said that a strict notice requirement gives a municipality an opportunity immediately to examine the place of an occurrence and interview witnesses before the passing of time has obscured the facts, an opportunity which the municipality might be denied in the absence of a notice requirement. What troubled the Law Reform Commission in 1974 and which continues to trouble us is that the same is true of large numbers of institutional defendants. It is difficult to see any principled basis upon which municipalities can be singled out for a special privilege which is denied other defendants.

The Commission is anxious to submit its final recommendations on this issue to the Attorney General as soon as possible. I think it is fair to say that nothing in the Commission's re-examination of this issue has, so far, persuaded us that any departure from the 1974 recommendation is called for. We thought it appropriate, however, to invite input from the municipalities before proceeding to final recommendations. We hope that this may be done through the Union of British Columbia Municipalities and the Municipal Officers' Association. A copy of this letter is, therefore, being sent to both bodies along with an invitation to comment on the current utility of the notice provision and possible justification for its retention. The views of individual municipalities would also be welcome. We hope to have heard from all concerned by August 31.

Thank you for your attention to this matter.

Yours sincerely,

Arthur L. Close,
Chairman

ALC/ss

APPENDIX A

LAW REFORM COMMISSION OF BRITISH COLUMBIA

July 19, 1989

City of Vancouver
453 West 12th Avenue
Vancouver, B.C.
V5Y 1V4

Attention: City Solicitor

Dear Sir:

Re: Notice Requirement: Vancouver Charter, s. 294(2)

Enclosed is a copy of a letter which I have just sent to the Union of British Columbia Municipalities and the Municipal Officers' Association. The observations made with respect to the Municipal Act apply with equal force to the notice requirement set out in section 294(2) of the Vancouver Charter. Its repeal was also recommended in the 1974 Report.

We would be pleased to receive any submissions which the City may wish to make respecting the retention or repeal of section 294(2).

Yours sincerely,

Arthur L. Close,
Chairman

Encls.

APPENDIX B

SUBMISSION FROM THE UNION OF BRITISH COLUMBIA MUNICIPALITIES

UNION OF BRITISH COLUMBIA MUNICIPALITIES

September 28, 1989

Mr. Arthur L. Close, Chairman
Law Reform Commission of British Columbia
Suite 601, Chancery Place
865 Hornby Street
Vancouver, B.C.
V6Z 2H4

Dear Mr. Close:

Re: *Municipal Act Section 755 - Two Month Limitation Period*

We appreciate the opportunity extended to the UBCM to allow the Executive and membership to consider and express it's position on this important matter.

The Executive reviewed and approved the enclosed brief at their September 18th 1989 meeting. The brief was prepared by Mr. Theo G. Pearce Q.C. the solicitor for the UBCM. Mr. Pearce and members of the Executive are available to discuss our position with you.

During the Convention the members endorsed two resolutions on this subject. Resolution A1 called for the retention of the section and Late Resolution 7, prepared by the Executive, mirrors the thrust of our brief. A copy of this resolution is also enclosed.

Yours truly,

Mayor Len Travoulay
President

APPENDIX B

SUBMISSION

This submission by the UBCM is made in response to a number of requests to the Attorney General of British Columbia to repeal the above Section which basically provides that no claim for damages can be made against a municipality or regional district unless notice in writing of the claim has been given to local government within two months from the date on which the damage was sustained. The Section reads as follows:

> **755.** The municipality is in no case liable for damages unless notice in writing, setting forth the time, place and manner in which the damage has been sustained, is delivered to the clerk within 2 months from the date on which the damage was sustained. In case of the death of a person injured the failure to give notice required by this section is not a bar to the maintenance of the action. Failure to give the notice or its insufficiency is not a bar to the maintenance of the action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes there was reasonable excuse and that the defendant has not been prejudiced by it in its defence

and is not new or unique to British Columbia. The Section appeared as an amendment to the Municipal Act as Section 21, Chapter 37, S.B.C. 1911. During its 78-year life, it remained literally unchanged and is almost identical to Section 755. It is also not unique to British Columbia in that in Alberta, Section 402 of the Municipal Government Act, R.S.A. 1980, provides for similar notice within a six-month period. Also in Saskatchewan, the Urban Municipalities Act and the Rural Municipalities Act, R.S. Sask. 1978, contain a requirement for notice where the claim is for damages arising out of the negligence in repairing highways. In Manitoba, Sections 222 and 228 of the Municipal Act, S.M. 1970, require notice in certain circumstances before any action can be taken for damages arising out of negligent structures or highways. The Province of Quebec, in its Cities and Towns Act, R.S. Que., c.C-19, Section 585, also requires similar notice within fifteen days from the date of the occurrence.

The inclusion of such notice provisions in these various statutes suggests some need for protection to municipalities as public bodies carrying out a multitude of services to its inhabitants. The reason for such need is stated clearly in Rogers (Canadian Municipal Corporations), 2 Ed., at page 1334:

> The plain object of legislation respecting the notice requirement...is to give municipal authorities the opportunity of investigating the cause of the injury, examining the place where it occurred and interviewing witnesses before the effluxion of time has obscured the claim. Notice of the claim gives the municipality a chance to get at the facts while the evidence is available and fresh in the minds of the witnesses enabling it to defend itself against unfounded claims. Nevertheless, its purpose is not to allow it to escape liability on technical grounds. Provisions relating to notice, being in derogation of common law rights, should be strictly construed and cannot be extended by implication beyond their terms.

There is a further important reason for notice requirements, namely, to prevent further injury or damage to persons using municipal property. If any danger exists which might cause injury or damage to persons or property, then it is imperative that the municipality receive notice so that such danger can be removed. This is especially important in parks and recreational areas which are primarily for the use and enjoyment of the public.

For 63 years, Section 755 worked well for municipalities with little adverse comment as to undue hardship on claimants. There can be little doubt that early notice of claims was beneficial to municipalities in satisfying the purposes set out above. It allowed early investigation, early settlement of claims, and the protection of the public from similar occurrences.

In 1974, the Law Reform Commission of British Columbia, took issue with the notice provisions in the Municipal Act and reported as follows:

> There are two basic types of notice requirement found in the British Columbia statutes. The first requires the giving of notice a certain time before an action is brought. The purpose of such a provision would appear to be the encouragement of settlements or to put the potential defendant on his guard. Such a notice requirement is relatively innocuous unless it is coupled with a short limitation period.

The Commission went on to discuss the power of the Court to relieve against failure to give notice and various recommendations for extending such exemption. It then stated:

> That recommendation, however, fails to deal with the broader question of why some bodies should receive the protection of a notice provision while others do not. This Commission feels that the potential injustice which can be created by a notice provision, and the undesirability of certain institutions receiving preferred treatment under the law of limitations, outweighs the benefits which the community may receive from the existence of those notice requirements.

With great respect to the Commission, there is little or no evidence to justify its conclusion. It is submitted that over the 63 years prior to the Commission's Report, there is little evidence of potential injustice and certainly no evidence to sustain the position that such injustice "outweighs the benefits which the community may receive from the existence of those notice requirements." The Commission indicates no study of the benefits to the municipality and it is indeed difficult to understand how the Commission could weigh such differences without such study. With great respect to the Commission, it is submitted that municipalities have received immeasurable benefits from early knowledge of potential claims.

Further, with respect to the Commission, the purposes of Section 755 are not limited to the purposes set out in the Report. No mention is made of early detection of dangerous situations in public areas and the duty of the municipality to alleviate same.

A careful reading of the Report would indicate that the recommendation to repeal Section 755 is based on the theoretical concept that municipalities should not have "preferred treatment" over other persons or institutions. This con-

clusion is only valid where there is no difference between the body obtaining the preference. This is not so with municipalities who are legislative bodies attempting to provide public services over large and varied areas of the province. It would be difficult for a municipality to sympathize with the theoretical concept when a claim is received in August based on negligence in removing ice and snow from a sidewalk in January.

The Law Society of British Columbia has supported the recommendation of the Commission on similar grounds, or with perhaps one additional ground, claims against its members for negligence in failing to give timely notice. Repealing the Section would lessen claims against lawyers and increase them against municipalities.

There is a general recognition that claimants should pursue legal claims within a reasonable time. No person or institution should sit on its rights until the evidence on which the right is based no longer exists or witnesses have disappeared or expired. In time, memories of events fade and distort. This has led to the establishment of limited periods for instituting legal action, e.g. limitation periods. Every cause of action has a limitation period during with (sic) Court action must be initiated. Failure to start proceedings within the limitation period is a bar to such proceedings. The only disagreement with limitation periods in the length of the period, should it be two years as in motor vehicle accidents or six years for recovery of debts. The Limitation Act, R.S.B.C 1979, Chapter 236, contains different limitations for different claims and a recognition that there should be a finality to potential claims. Based on the reasonableness of limitation periods and recognizing that differences are justified in different circumstances, the only question on Section 755 can be stated simply: is it reasonable? The UBCM position is that Section 755 is reasonable and justified.

There can be little doubt that a municipality differs from most other persons and institutions. In addition to its authority to provide and maintain a myriad of services, it has statutory duties to protect the health and welfare of its inhabitants. It must assume many duties, regardless of risk, unlike many persons and institutions who can measure the risk and make their own determination as to whether the adventure will be undertaken.

A municipality cannot ignore problems arising in health, waste management and the provision of roads. It cannot only undertake those things that are profitable or from which it may anticipate a profit. It must often expand its efforts in dealing with problems created by others.

There are three basic areas of complaint against Section 755. They are as follows:

(1) "damages" should not include those arising from contract;

(2) "reasonable excuse" has been restricted severely by the Courts;

(3) the burden or proving prejudice should be on the municipality.

There is some justification for such criticism. Firstly, with regard to the meaning of "damages," Madame Justice Southin in Donaldson Engineering & Construction Ltd. v. City of Nanaimo and Hunter (1987), 20 B.C.L.R. (2d) 196, held that damages included those arising under contract as well as out of tort. This case was followed in Carston v. Cowichan Valley Regional District

(1988), 28 B.C.L.R. (2d) 360. In Craig's Construction (Pincher Creek) Ltd. v. District of Sparwood (1987), 17 B.C.L.R. (2d) 34, the Honourable Judge Cowan came to the opposite result. It is agreed that there is not the same justification for notice requirements where the damages arise out of contract. It is submitted that in this regard the municipality should be treated the same as other institutions. A simple amendment to the Section could confine damages to those for personal injury or property damage arising out of tort.

With regard to "reasonable excuse," there is a substantial body of case law which has severely restricted exemption from the notice provisions. It is clear that ignorance of the law, negligence, infancy or physical disability does not provide reasonable excuse. Even the most serious physical injuries, which might incapacitate the claimant, do not provide an excuse for failure to give notice.

It is submitted that the intent of this Section was to allow the Court to prevent undue hardship in individual cases and to allow the Court to look at all the circumstances in granting relief. Again, rather than denouncing the notice provisions, a simple amendment would permit the Courts to allow exemption where there was no prejudice to the municipality and undue hardship to the claimant. Minor surgery, not amputation, would provide an answer to those critics of the Section other than the pure theorists whose desire for conformity outweighs any practical considerations. It would also provide benefits to municipalities without undue hardship to claimants.

All arguments against prejudice could be eliminated by placing the burden of proof on the municipality.

In Summary, Section 755 has a history of 87 years with little evidence of individual injustice and much evidence that it benefits all residents and taxpayers in our communities. The allegations of individual injustice can be eliminated by amendment to allow the Courts a wide discretion to allow exemption where there is individual hardship and no prejudice to the taxpayers of the municipality or regional district.

The Section is necessary to maintain the public interest of the community at large and its repeal would mean that communities would have great difficulty in defending claims where the evidence and witnesses had disappeared. It would undoubtedly increase insurance rates or make insurance more difficult to obtain. In the long run, it may not benefit claimants as municipalities, without the benefit of notice and proper investigation, may be more inclined to ask the claimant to prove his case. Thus, the repeal of this Section may not benefit claimants or municipalities and may well injure both. With some amendment, it will continue to serve its original purpose and be beneficial to both.

APPENDIX B

LR7 TWO-MONTH LIMITATION PERIOD (S. 755)

(UBCM Resolution)

WHEREAS Section 755 provides a two-month limitation period for municipalities and regional districts;

AND WHEREAS the interpretations of the section by the courts has prompted a call for the section's repeal:

THEREFORE BE IT RESOLVED that the Provincial Government retain the two-month limitation period in Section 755;

AND BE IT FURTHER RESOLVED that Section 755 be amended to:

not apply to actions applying to contract;

give greater guidance to the courts in providing relief in legitimate hardship cases.

APPENDIX C

SUBMISSION FROM THE CITY OF VANCOUVER

Law Department

City Of Vancouver

August 9, 1989

Arthur L Close
Chairman
Law Reform Commission of B.C.
601, 865 Hornby Street
Vancouver, British Columbia
V6Z 2H4

Dear Sir:

Re: Notice Requirement - *Vancouver Charter* - Section 294(2)

This is in response to your invitation to present submissions on your Commission's recommendations respecting the repeal of Section 294(2). It is the City of Vancouver's position that this section is of critical importance to the City and its repeal would result in a situation which would be patently unfair to the taxpayers of this City.

I note that in your letter to the Director of UBCM. you acknowledge that a notice requirement gives a municipality an opportunity to immediately examine the place of an occurrence and interview witnesses before time obscures the facts, an opportunity which a municipality might be denied in the absence of a notice requirement. You go on to say that, what troubled the Law Reform Commission is that the same is true of large numbers of institutional defendants and, therefore, it is difficult to see any basis upon which municipalities can be singled out for a special privilege.

With respect, I suggest your conclusion overlooks a very fundamental point. Assuming that there are any institutional defendants with the assets and extent of the operations similar to the City of Vancouver (which I doubt), the fact is that these institutional defendants are not open to the public.

For example, the City of Vancouver has approximately 1400 kilometers of roads, 700 kilometers of lanes, 2700 kilometers of sidewalks, 2000 miles of sewers, 900 miles of watermains, 97000 water service pipes, 6000 fire hydrants, 15 public swimming pools, 8 public ice rinks, 23 community centres and 162 parks on 3000 acres.

Anytime one of our workers does anything negligent in respect of maintenance or repair to the foregoing infrastructure, we are liable.

Our streets, lanes, sidewalks and parks are open to the public 24 hours a day, 7 days week. Over the years anything that can happen does happen.

I am sure large corporations such as MacMillan Bloedel and Marathon Realty have many accidents on their various properties. However, I am equally sure that their risk management people are made aware of such accidents because their properties are closed to the public and, therefore, every accident of consequence is likely to be immediately known and reported. With City property, roads, lanes, sidewalks, etc., it is extremely unlikely that our risk management people would, in the absence of notice, be aware of more than 2 or 3% of the accidents which occur. On a nice day upwards of 50,000 people use the facilities at Stanley Park. My guess is 4 or 5 of these people trip and fall or otherwise injure themselves. How is it fair that persons in that situation can simply wait two years and then commence an action for damages?

In addition, if we are notified of a dangerous situation which has caused an injury, we can and do take remedial action. Without notice the danger may remain for some time and others may be injured.

Furthermore, the notice provision is not absolute. The Section in question does provide for a judicial waiver if the court is satisfied that the claimant has a reasonable excuse.

In summary, I think an analogy between the City and institutional defendants is not well founded. If this section were to be repealed, it would be a disaster in terms of the City's ability to defend itself in tort actions.

I thank you for this opportunity to comment.

Yours very truly

John L. Mulberry
Director of Legal Services

P.S. This submission was approved by Vancouver City Council on August 15, 1989.

APPENDIX D

A NOTE ON THE LAW IN RELATION TO OCCUPIERS' LIABILITY

A. Generally

The law has, for may years, imposed a duty of care on the owners and occupiers of land with respect to unsafe premises.[1] If this duty is not observed a person who enters on to the premises, and suffers injury as a result, has a cause of action against the occupier. The body of case law which developed in the last century to define this duty of care had a number of unsatisfactory features[2] and the last two decades has seen its replacement, in most jurisdictions, by a statutory restatement which has reformed and rationalized it. In British Columbia the relevant legislation is the *Occupiers Liability Act*.[3] The full text of the Act is set out as Appendix F to this Report.

The core of the Act is section 3 which defines the duty of care owed by an occupier:

> **Occupiers' duty of care**
>
> 3. (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and his property, on the premises, and property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
> (a) condition of the premises;
> (b) activities on the premises; or
> (c) conduct of third parties on the premises.
>
> (3) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risks.

That provision should be read in the light of the following definitions:

> "occupier" means a person who
> (a) is in physical possession of premises; or
> (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,
>
> and, for this Act, there may be more than one occupier of the same premises;
>
> "premises" includes
> (a) land and structures or either of them,...

Section 8(2) should also be noted:

> (2) Notwithstanding subsection (1), this Act does not apply to the Crown in right of the Province or in right of Canada or to a municipality where the Crown or the municipality is the occupier of a public highway or public road or a road under the *Forest Act* or the *Private Roads Act, 1963*, or to an industrial road as defined in the *Highway (Industrial) Act*.

With the exception of roads and highways, the *Occupiers Liability Act*

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1. A comprehensive discussion of this body of law may be found in Di Castri, *Occupiers' Liability* (1980). *See also* Linden, *Canadian Tort Law* (4th ed., 1988) 599; Fleming, *The Law of Torts* (7th ed., 1987) 417.
2. In particular, highly refined distinctions were drawn between differing classes of visitor (invitee, licensee and trespasser) with the duty of care owed depending on the classification.
3. R.S.B.C. 1979, c. 303.

seems to apply to municipalities with full force. Di Castri offers the following observations respecting their position:[4]

> Absent something to show a contrary intention, the legislature intends that a statutory body shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things. The universality of this principle is accepted by the Canadian Occupiers' Liability Acts, which do not exclude from their operation municipal corporations, except insofar as they have the management, direction and control of public highways and certain roads.
>
> It appears that where municipal works, carried out on private land by agreement with the owner, are the effective cause of injury to a third party, liability is determined on general principles of negligence, albeit, vis a vis the owner, the municipal corporation is a licensee. However, in view of the expanding doctrine of "notional occupier", it should not be assumed that in all cases a municipal corporation will, or should, escape being categorized as an occupier.
>
> However, in one aspect a municipal corporation may be said to be unique. It has a variety of functions, some legislative, some with also a quasi-judicial component and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter the corporation may, apart from statute, incur liabilities in contract and in tort, including liability in negligence.
>
> Under the common law rules of occupiers' liability a municipal corporation, in the exercise of its "business powers" has been held to be the occupier of, e.g., a: municipal beach; municipal park; public skating rink; recreation centre; land occupied by city and constituting only available playground; lavatory maintained for the convenience of the public; portion of heavily frozen river in which municipal ferry anchored during winter months; municipal building used for a banquet hall; municipal building housing collector of taxes and other officials.
>
> ...
>
> At common law there is no distinction between private owners and municipal corporations as to the standard of care due contractual entrants, invitees, and licensees: their responsibilities, if any, towards trespassers are also uniform. Neither does a municipal corporation, absent express statutory immunity, enjoy any special advantages qua a landlord. In determining category, entrants to municipal premises such as park and recreational facilities usually find themselves automatically categorized as licensees. In respect of other municipal premises a somewhat confused flexibility appears to determine category. Of course, if a plaintiff's injury is the result of a danger created by the active negligence of the municipal corporation, general principles of negligence apply.

B. Highway Authorities

The liability of highway authorities is a topic which was examined by the Law Reform Commission of British Columbia in 1977 in a Report titled *Tort Liability of Public Bodies*.[5] The law of the province, as it then existed, drew a distinction between "misfeasance" and "nonfeasance." The maintenance or repair of a road which is done badly (misfeasance) could form the basis of liability. A mere failure to maintain (nonfeasance) would not render the highway authority liable in the absence of a positive statutory duty to repair.

The legal position of public bodies in relation to the way they carry out their functions has seen rapid change in the last decade. A new analytical framework has arisen which attempts to judge the action or inaction of public bodies in terms of whether a particular function can be characterized as "oper-

4. *Supra*, n. 1 at 196.
5. LRC 34.

ational" or one of policy and resource allocation.[6] How far this new framework has overtaken the former law is unclear:[7]

> When the actor or the one who fails to act is a governmental institution, things get more complicated. Not only must the courts grapple with the difficult duty issues and the complex economic loss problems, but they must also struggle with the matter of judicial regulation of governmental activity. One author has suggested that, in these cases, the distinction between nonfeasance and misfeasance had been abolished, a delightful consequence, but this may have been more wishful thinking than accurate description. Another author, perhaps closer to correctly depicting the morass, indicated that there were ten different techniques for approaching these issues, a prospect that gives no comfort to jurists.
>
> Until recently, there was not as much awareness of the difficulties, so that some courts imposed liability on governmental institutions without engaging in much deep analysis of the problems.
>
> ....
>
> Recently a new set of phrases are being employed in the resolution of some of these problems. There are certain types of governmental functions that the courts feel must be immune from challenge by civil action. There are others ... which may properly be subject to tort suits. Thus the courts will permit tort actions for acts they can classify as "operational", "administrative" or "business powers", but not for "legislative", "judicial", "quasi-judicial", "planning" or "policy" functions.
>
> Although it is recognized that drawing distinctions between these two different types of conduct by public bodies is difficult, the courts have set out on a course of trying to do so.
>
> ... [W]e see a complex picture emerging in which it is difficult to forecast the outcome of the cases. The labels used are not very helpful, being phrases that describe conclusions more than the reasoning process used to arrive at those conclusions. There is a judicial and academic consensus that certain governmental decisions should be immune from negligence liability, but how and where to draw the line ... is still undecided.

The difficulty in drawing the distinction referred to is vividly illustrated by *Just* v. *British Columbia*,[8] the most recent British Columbia decision in relation to the liability of a highway authority and also the most recent pronouncement of the Supreme Court of Canada on this question. The case involved a large rock on a bluff above a highway. Through the action of tree roots and weather the rock had become unstable. It was dislodged and fell to the highway below causing death and serious injury. The liability of the highway authority turned on the extent of the duty, if any, which was on it to inspect for such a hazard. The trial court decision was summarized as follows:[9]

> Before the issue of negligence can arise, it must be determined whether the conduct complained of falls within the category of acts for which governmental bodies may be held liable. This category concerns conduct which is "operational" as opposed to conduct which falls within the realm of "policy" and which is not reviewable by the courts.
>
> ...
>
> In this case the conduct at issue fell within the realm of policy. A decision of the rock scaling crew as to what slopes to inspect and scale is a planning decision and their choice of when and where to inspect and do remedial work is essentially a matter of deciding where the limited resources made available within the allocated budget can best be applied. The crew has virtually an absolute discretion as to

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6. *See* the cases cited in *Just* v. *B.C.*, *infra*, n. 8.
7. Linden, *supra*, n. 1 at 291.
8. (1985) 64 B.C.L.R. 349 (S.C), *aff'd.* (1987) 10 B.C.L.R. (2d) 223 (C.A.), *rev'd.* [1989] S.C.J. No. 121, File No.: 20246 (unreported, Dec. 7, 1989, S.C.C.)
9. *Ibid.*

> when and where it works. It creates the standards and it determines their enforcement so that there are no standards to which it is required to work or against which its conduct can be evaluated apart from those it sets itself. Nor did the fact that the crew, as the body making the decision, worked in the field prevent the decision from being a matter of policy. Higher policy-making organs of government may delegate their policy-making powers to those charged with dealing with problems on a day-to-day basis.

The Court of Appeal affirmed both the approach of the trial court and the result holding that the highway authority was not liable.

The Supreme Court of Canada re-examined the problem of characterizing a decision as operation or policy. Mr Justice Cory, speaking for the majority, observed:

> It may be convenient at this stage to summarize what I consider to be the principles applicable and the manner of proceeding in cases of this kind. As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.
>
> In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the bona fide exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision- making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.
>
> The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.

More detailed comments were directed at the standard of care in this context:

> Let us assume a case where a duty of care is clearly owed by a governmental agency to an individual....In those circumstances the duty of care owed by the government agency would be the same as that owed by one person to another. Nevertheless the standard of care imposed upon the Crown may not be the same as that owed by an individual. An individual is expected to maintain his or her sidewalk or driveway reasonably, while a government agency such as the respondent may be responsible for the maintenance of hundreds of miles of highway. The frequency and the nature of inspection required of the individual may well be different from that required of the Crown. In each case the frequency and method must be reasonable in light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in light of all the circumstances including budgetary limits, the personnel and equipment available to it and that it had met the standard duty of care imposed upon it.

In applying this analysis to the circumstances of the case it was the view of the Supreme Court of Canada that decision in respect of rock scaling was operational in character. Because, however, it was originally characterized as one of policy, "no findings of fact were made on the issues bearing on the standard of care" and "the negligence issue had to be canvassed in its entirety" a new trial was ordered.

APPENDIX E

A NOTE ON THE LAW IN RELATION TO NUISANCE AND MUNICIPAL BODIES

It is virtually impossible, in a limited space, to give any accurate picture of the dimensions and characteristics of the tort of nuisance. The core concept is that nuisance is the unreasonable interference with an owner's enjoyment and use of land, or interference with some right to the use of public property. But the application of that concept to particular situations reveals a difficult and complex body of law. Fleming observes:[1]

> Few words in the legal vocabulary are bedevilled with so much obscurity and confusion as 'nuisance'. Once tolerably precise and well-understood, the concept has eventually become so amorphous as well-nigh to defy rational exposition. Much of the difficulty and complication surrounding the subject stems from the fact that the term 'nuisance' is today applied as a label for an exceedingly wide range of legal situations, many of which have little in common with one another. Far from susceptible of exact definition, it has become a catch-all for a multitude of ill-assorted sins, linking offensive smells, crowing roosters, obstructions of rights of way, defective cellar-flaps, street queues, lotteries, houses of ill-fame and a host of other rag-ends of the law.
>
> [N]uisance is a field of tort liability rather than any particular type of tortious conduct. Its unifying element resides in the general kind of harm caused, not in any particular kind of conduct causing it... [It is] primarily concerned with conflict arising from competing uses of land...

The reader is urged to consult any of the standard treatises on tort law for a fuller exposition.

Given the scope of the activities of municipal bodies there are a variety of ways in which their conduct might constitute actionable nuisance.[2] It is important to note two ways in which they occupy a special position in relation to the law of nuisance.

First, municipalities have been insulated from liability in nuisance with respect to several of the functions associated with their "special character." Section 755.3 of the *Municipal Act* provides:

> **Nuisance actions**
>
> **755.3** A municipality, regional district, council, regional board, improvement district or greater board, as defined in section 943, is not liable in any action based on nuisance or on the rule in Rylands v. Fletcher where the damages arise, directly or indirectly, out of the breakdown or malfunction of
>
> (a) a sewer system,
> (b) a water or drainage facility or system, or
> (c) a dyke or a road.

A similar provision is contained in the *Vancouver Charter*.[3]

Second, a municipality may have a special defence in a nuisance action which is not available to others. The defence of "statutory authority" was discussed by the Law Reform Commission of British Columbia in its 1977 Report on *Tort Liability of Public Bodies*. The defence arises when a public body can rely on authorizing legislation to insulate itself from liability. The circum-

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1. Fleming, *The Law of Torts* (7th ed., 1987) 379.
2. The *Municipal Act* itself seems to take a broad view of what might constitute a nuisance. In a section headed "nuisances and disturbances" (s. 932) it describes a variety of activities and situations which a municipality may regulate or prohibit by bylaw.
3. S. 294(9).

stances in which the defence is available was recently restated by the Supreme Court of Canada:[4]

> The principles to be derived from the ... authorities would seem to be as follows:
>
> (a) if the legislation imposes a duty and the nuisance is the inevitable consequence of discharging that duty, then the nuisance is itself authorized and there is no recovery in the absence of negligence;
>
> (b) if the legislation, although it merely confers an authority, is specific as to the manner or location of doing the thing authorized and the nuisance is the inevitable consequence of doing the thing authorized in that way or in that location, then likewise the nuisance is itself authorized and there is no recovery absent negligence.
>
> However:
>
> (c) if the legislation confers an authority and also gives the public body a discretion, not only whether to do the thing authorized or not, but how to do it and in what location, then if it does decide to do the thing authorized, it must do it in a manner and at a location which will avoid the creation of a nuisance. If it does it in a way or at a location which gives rise to a nuisance, it will be liable therefor, whether there is negligence or not.
>
> In other words, in the situations described in (a) and (b) above the inevitability doctrine is a good defence to the public body absent negligence. In situation (c) it is no defence at all and it is unnecessary for the plaintiff to prove negligence in order to recover.

4. *Tock* v. *St. John's Metropolitan Area Bd.* (unreported, Dec. 7, 1989) *per* Wilson J.

APPENDIX F

OCCUPIERS LIABILITY ACT
R.S.B.C. 1979, CHAPTER 303

Interpretation

1. In this Act

"occupier" means a person who
(a) is in physical possession of premises; or
(b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,
and, for this Act, there may be more than one occupier of the same premises;

"premises" includes
(a) land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (c);
(b) ships and vessels;
(c) trailers and portable structures designed or used for a residence, business or shelter; and
(d) railway locomotives, railway cars, vehicles and aircraft while not in operation;

"tenancy" includes a statutory tenancy, an implied tenancy and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.

Application of Act

2. Subject to section 3 (4), and sections 4 and 9, this Act determines the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which he is by law responsible.

Occupiers' duty of care

3. (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and his property, on the premises, and property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to the
(a) condition of the premises;
(b) activities on the premises; or
(c) conduct of third parties on the premises.

(3) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risks.

(4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is in-

cumbent on him by virtue of an enactment or rule of law imposing special standards of care on particular classes of person.

Contracting out

4. (1) Subject to subsections (2), (3) and (4), where an occupier is permitted by law to extend, restrict, modify or exclude his duty of care to any person by express agreement, or by express stipulation or notice, the occupier shall take reasonable steps to bring that extension, restriction, modification or exclusion to the attention of that person.

(2) An occupier shall not restrict, modify or exclude his duty of care under subsection (1) with respect to a person who is

(a) not privy to the express agreement; or

(b) empowered or permitted to enter or use the premises without the consent or permission of the occupier.

(3) Where an occupier is bound by contract to permit persons who are not privy to the contract to enter or use the premises, the duty of care of the occupier to those persons shall, notwithstanding anything to the contrary in that contract, not be restricted, modified or excluded by it.

(4) This section applies to all express contracts.

Independent contractors

5. (1) Notwithstanding section 3 (1), where damage is caused by the negligence of an independent contractor engaged by the occupier, the occupier is not on that account liable under this Act if, in all the circumstances,

(a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and

(b) it was reasonable that the work that the independent contractor was engaged to do should have been undertaken.

(2) Subsection (1) shall not be construed as restricting or excluding the liability of an occupier for the negligence of his independent contractor imposed by any other Act.

(3) Where there is damage under the circumstances set out in subsection (1), and there is more than one occupier of the premises, each occupier is entitled to rely on subsection (1).

Tenancy relationship

6. (1) Where premises are occupied or used by virtue of a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on his part in carrying out his responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using them.

(2) Where premises are occupied by virtue of a subtenancy, subsection (1) applies to a landlord who is responsible for the maintenance or repair of the premises comprised in the subtenancy.

(3) In this section

(a) a landlord is not in default of his duty under subsection (1) unless his default would be actionable at the suit of the occupier;

(b) nothing relieves a landlord of a duty he may have apart from this section; and

(c) obligations imposed by an enactment in respect of a tenancy are deemed imposed by the tenancy.

(4) This section applies to all tenancies.

Negligence Act

7. The *Negligence Act* applies to this Act.

Crown bound

8. (1) Except as otherwise provided in subsection (2), the Crown and its agencies are bound by this Act.

(2) Notwithstanding subsection (1), this Act does not apply to the Crown in right of the Province or in right of Canada or to a municipality where the Crown or the municipality is the occupier of a public highway or public road or a road under the *Forest Act* or the *Private Roads Act, 1963*, or to an industrial road as defined in the *Highway (Industrial) Act*.

Not to affect certain relationships

9. This Act does not apply to or affect the liability of

(a) an employer in respect of his duties to his employee;

(b) a person by virtue of a contract for the hire of, or for the carriage for reward of persons or property in, any vehicle, vessel, aircraft or other means of transport;

(c) a person under the *Hotel Keepers Act*; or

(d) a person by virtue of a contract of bailment.